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Save Our Sound OBX, Inc. v. North Carolina Department of Transportation

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Save Our Sound OBX, Inc. v. North Carolina Department of Transportation, 914 F.3d 213 (4th Cir. 2019)

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The Fourth Circuit Court of Appeals recently ruled in favor of several governmental agencies seeking to construct a new bridge in the Pamlico Sound adjacent to North Carolina's Outer Banks. For years, state and federal agencies have put forth a massive coordinated effort to address the constant weather damage and erosion which occurs to a section of North Carolina Highway 12. The court found the agencies properly cleared NEPA's environmental review requirements for the bridge's construction. Additionally, the opponent-litigants' efforts to add claims challenging the project, based on new information about a shipwreck in the bridge's path, were futile.

I. INTRODUCTION

In *Save Our Sound OBX, Inc. v. North Carolina Department of Transportation*,[1] the Federal Highway Administration ("FHWA") and North Carolina's Department of Transportation ("NCDOT") (collectively, the "Agencies") cleared a hurdle as defendants in a legal battle over the construction of a 2.4-mile-long bridge ("Jug-Handle Bridge") over the Pamlico Sound adjacent to North Carolina's Outer Banks.[2] The plaintiffs were opponents of the North Carolina Highway 12 ("NC-12") Jug-Handle Bridge project and included members of Save Our Sound OBX, Inc. and a group of Outer Banks residents and vacationers (collectively, "SOS").[3] SOS sued, alleging the Agencies violated the National Environmental Policy Act ("NEPA") and the Department of Transportation Act ("DTA") in approving the Jug-Handle Bridge project.[4] On appeal, the Fourth Circuit Court of Appeals affirmed: (1) summary judgment for the Agencies based on a record of adequate environmental analysis and no evidence of predetermination; and (2) denial of SOS's motion to amend its complaint to allege new claims about a shipwreck in the path of Jug-Handle Bridge because the claims were unripe and thus insufficient for review.[5]

II. FACTUAL AND PROCEDURAL BACKGROUND

The Agencies sought for years to reconstruct segments of NC-12, the primary road traversing the Outer Banks of North Carolina, which is

1. 914 F.3d 213, 217, 229 (4th Cir. 2019).
2. *See id.*; *see generally Appeals Court Dismisses Challenge to Jug Handle Bridge Construction*, ISLAND FREE PRESS, Jan. 24, 2019, https://islandfreepress.org/outer-banks-news/appeals-court-dismisses-challenge-to-jug-handle-bridge-construction/.
3. *Save Our Sound OBX, Inc.*, 914 F.3d at 217.
4. *Id.*
5. *Id.* at 217, 227, 229.

vulnerable to deterioration from erosion and weather.[6] To coordinate decision-making and regulatory compliance for the project, the Agencies created a team consisting of administrators and representatives from ten state and federal agencies ("Merger Team").[7] Relevant to this litigation was the section of NC-12 connecting the village of Rodanthe to the southern tip of Bodie Island.[8] The Merger Team was charged with developing Environmental Assessments ("EA") and Environmental Impact Statements ("EIS") pursuant to NEPA and the DTA, as well as deciding the least environmentally-damaging practicable alternative ("LEDPA") for NC-12 construction under section 404 of the Clean Water Act ("CWA").[9] From 2008 to 2013, the Merger Team issued a number of EISs and EAs, examining the alternatives to construction and changes in circumstances around the proposed project.[10] Following Hurricane Irene's devastation in 2011, the Merger Team issued an updated EA in 2013 with four alternatives: (1) the Jug-Handle Bridge extending into the Pamlico Sound; (2) an easement bridge in NC-12's existing alignment; (3) beach nourishment; and (4) beach nourishment with the easement bridge.[11] Due to expert reports on "high erosion rate and lack of sand supply," the Merger Team declined to extensively study the beach nourishment alternatives.[12] In 2013, the Merger Team concluded the easement bridge was the LEDPA pursuant to the CWA, though some team members "cited concerns about its location within the surf zone, additional permits associated with erosion setback requirements, and its impacts on a nearby wildlife refuge."[13]

In 2014, two environmental groups sued the Agencies for violations of NEPA with respect to a different segment of the NC-12 project.[14] The settlement agreement ("Settlement") reached by the parties in 2015 required the NCDOT to both name the Jug-Handle Bridge as its preferred alternative for the disputed section of NC-12 and to pursue the Merger Team's consensus that the Jug-Handle bridge was the LEDPA.[15] In return, the environmental groups agreed to dismiss their claims and not sue the Agencies if they selected the Jug-Handle Bridge in the Record of Decision ("ROD") for the NC-12 project.[16]

In 2015, the Agencies selected the Jug-Handle Bridge as the preferred alternative, and the Merger Team subsequently identified it as the LEDPA after detailed studies and public comment.[17] The Merger Team issued an updated EA in 2016, which evaluated both the Jug-Handle

6. *Id.* at 217–218.
7. *Id.* at 218, 226, 229 n.1.
8. *Id.* at 219.
9. *Id*.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 219–220.
14. *Id.* at 220.
15. *Id.*
16. *Id.*
17. *Id.*

Bridge's environmental impacts and effects from its associated construction activities.[18] Ultimately, the Merger Team approved the Jug-Handle Bridge in a 2016 ROD, which also addressed the presence of a shipwreck in the bridge's path and commanded a data recovery project for the shipwreck.[19]

In February 2017, SOS sued the Agencies, alleging violations of NEPA and the DTA.[20] The two environmental groups from the 2015 litigation intervened on SOS's behalf.[21] SOS alleged the Agencies violated NEPA principally because the Jug-Handle Bridge's approval in the 2016 ROD was predetermined by the earlier Settlement.[22] Procedurally, the district court denied SOS's motion to amend its complaint to add a claim that the Agencies failed to adequately consider the shipwreck.[23] All parties then filed cross-motions for summary judgment as to whether the Agencies' EAs violated NEPA.[24] The district court granted summary judgment in favor of the Agencies and denied SOS's motions; SOS appealed.[25]

III. ANALYSIS

A. The Agencies Fulfilled NEPA Requirements

The court dismissed SOS's three central arguments with respect to its NEPA claim.[26] First, SOS argued the Agencies should have prepared a supplemental EIS to assess the environmental impacts of the Jug-Handle Bridge alternative, as it differed from previously evaluated options, and should have reexamined beach nourishment alternatives.[27] Pursuant to NEPA, an agency must prepare a supplemental EIS if it makes significant changes to a proposed action which involve environmental issues or if "'[t]here are significant new circumstances or information' that would affect the environmental impacts of the proposed action."[28]

The court applied a two-step review of the Agencies' decision against preparing a supplemental EIS by first determining whether the Agencies took a "hard look" at the new circumstances presented and second determining whether the decision was arbitrary or capricious under

18. *Id.*

19. "The shipwreck is eligible for listing on the National Register of Historic Places." *Id.* The court also noted the Agencies have not yet determined a response to new evidence that the shipwreck was a World War II assault vessel. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 221.

25. *Id.*

26. *Id.* (reviewing summary judgment *de novo*).

27. *Id.* at 221–222 (quoting Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996) ("[T]he changes 'must present a seriously different picture of the environmental impact of the proposed project.'")).

28. *Id.* (citing 40 C.F.R. § 1502.9(c) (2018)).

the Administrative Procedure Act.[29] At step one, the court found the Agencies took a hard look at the alignment changes for the Jug-Handle Bridge because the 2016 EA explicitly described in detail the similarities and differences between the 2016 design and the 2009, 2010, and 2013 versions.[30] The court cited an example from the 2016 EA and noted the Agencies relocated the bridge alignment to bypass areas with "dense submerged aquatic vegetation"—areas which lay in conflict with the Jug-Handle Bridge's prior versions.[31] At step two, the court found the Agencies' decision not to prepare a supplemental EIS was not arbitrary or capricious because of the adequate explanation of the Jug-Handle Bridge's various differences in the 2016 EA and the 2016 ROD determination that its final alignment was not a "seriously different picture" with respect to any major environmental concerns.[32]

The court reached a similar conclusion in addressing SOS's related claim that the Agencies failed to reconsider the beach nourishment alternative after new information emerged.[33] The court noted the 2016 EA thoroughly discussed new information about coastal conditions and the details of a 2014 emergency beach nourishment project.[34] Importantly, "erosion and sand supply were not the Agencies' only reasons for initially rejecting beach nourishment," and the "new information proffered by SOS did not implicate all of the Agencies' independently adequate reasons for initially rejecting beach nourishment" in the 2008 EIS. [35]

Second, SOS argued the Agencies violated NEPA in the 2016 EA by failing to adequately consider environmental impacts from construction traffic and haul roads in a smaller area—the town of Rodanthe.[36] NEPA's requirements extend to impacts resulting from increased traffic and use of construction roads for highway construction projects.[37] Agencies must offer "full and fair discussion" of environmental effects from construction roads and traffic near an agency project.[38] Ultimately, the court rejected SOS's argument because the 2008 EIS properly addressed environmental and construction effects from the project *as a whole*,[39] and the Agencies'

29. *Id.* at 222 (citing Hodges v. Abraham, 300 F.3d 432, 446 (4th Cir. 2002); *Hughes River Watershed Conservancy*, 81 F.3d at 443).

30. *Id.* at 222–223.

31. *Id.* at 222.

32. *Id.* at 223.

33. *Id.*

34. *Id.* at 223–224.

35. *Id.* at 223.

36. *Id.* at 224.

37. *Id.* (citing Arlington Coal. on Transp. v. Volpe, 458 F.2d 1323, 1332 (4th Cir. 1972)).

38. *Id.* (citing 40 C.F.R. § 1502.1 (2018)).

39. The court noted "the discussion did not explicitly consider haul roads in the Rodanthe area" but nevertheless, ". . . NEPA does not compel the Agencies to specifically consider the environmental impacts of haul roads so long as they adequately explain the environmental consequences of the Jug-Handle Bridge project, including construction impacts, *as a whole*." *Id.* at 224 n.6 (citing 40 C.F.R. § 1502.2(b) (2018)) (emphasis added).

determination of the Jug-Handle Bridge as the LEDPA was appropriate where the Agencies adequately compared its construction traffic effects against the other proposed alternatives in the 2013 and 2016 EAs.[40]

Third, SOS argued the Agencies violated NEPA because the Agencies' decision "did not flow from their NEPA analysis but, rather, was a *predetermined* result of the Settlement."[41] SOS relied on the same environmental analysis arguments the court previously discussed—and disposed of—but also cited to cases from the Ninth and Tenth Circuits which found NEPA violations for predetermined agency action based on contractual commitments.[42] The court found that, while the Agencies changed their favored alternative to the Jug-Handle Bridge after the Settlement, the multiple EAs and EIS satisfied NEPA requirements and lacked objective evidence of predetermination.[43] The court also distinguished the Ninth and Tenth Circuit cases because those involved situations where agencies entered into contracts *before* conducting any environmental analysis whatsoever.[44] Furthermore, the Settlement was not itself objective evidence of predetermination, as it "only required NCDOT to identify the Jug-Handle Bridge as its preferred alternative and to seek Merger Team concurrence that the Jug-Handle Bridge was the LEDPA."[45]

Finally, reviewing the lower court's dismissal for an abuse of discretion, the court also affirmed the denial of SOS's motion to supplement the administrative record with external documents from the Settlement negotiations because there was no evidence the Agencies acted in bad faith,[46] and the existing record revealed their reasoning for approving the Jug-Handle Bridge.[47]

B. The District Court Did Not Err in Denying SOS's Motion to Amend

SOS also claimed the district court erred by denying SOS's motion to amend its complaint to add claims that the Agencies violated the DTA by approving a transportation project which "threaten[ed] to harm the land of a site of historic significance"—a World War II shipwreck named the Pappy's Lane Wreck.[48] The court, however, affirmed the district court's finding that the SOS's proposed amendments to the

40. *Id.*

41. *Id.* (emphasis added).

42. *Id.* at 224–226 (citing Davis v. Mineta, 302 F.3d 1104, 1112 (10th Cir. 2002); Metcalf v. Daley, 214 F.3d 1135, 1145 (9th Cir. 2000)).

43. *Id.*

44. *Id.* (emphasis added).

45. *Id.* at 226 n.8.

46. *Id.* at 227 (citing Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1991)).

47. The court also rejected SOS's argument that it must consider the documents as extra-record evidence because they deal with the Settlement's legal terms and would not help the court understand the environmental concerns. *Id.* (citing Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 201 (4th Cir. 2009)).

48. *Id.*

pleadings were futile.[49] First, the court determined SOS's claim that the Agencies improperly failed to consider the shipwreck was unripe because the Agencies had yet to make a final decision regarding new information indicating the shipwreck involved a World War II assault vessel.[50] Second, the court rejected SOS's argument that its proposed amendment would challenge the 2016 ROD's treatment of the shipwreck generally.[51] The court determined the Agencies fulfilled regulatory requirements when they ordered a data recovery project and determined the shipwreck did not warrant preservation in place—based on their knowledge of the wreck *at the time* of the 2016 ROD.[52] "SOS [could not] contend that it was challenging the adequacy of the 2016 ROD's treatment of the shipwreck when its claims 'rest[ed] upon recent discovery that the Pappy['s] Lane Wreck contain[ed] a World War II vessel."[53] Accordingly, the court affirmed the denial of SOS's motion to amend because the claim was unreviewable until the Agencies make a final decision on the new information.[54]

IV. CONCLUSION

Save Our Sound OBX, Inc. highlights how the Fourth Circuit reviews governmental entities' decision-making with respect to NEPA compliance, while further explaining the evidence it considers when ascertaining whether predetermination exists for an approved alternative.[55] Additionally, this case joins the ranks of others among the growing circuit split on approaching NEPA predetermination evidence and analysis.[56] Ultimately, while the type and scope of a project with environmental impacts necessarily affects the level of review required pursuant to NEPA, agencies working on coastal projects of similar magnitude may now consider this case insofar as whether their environmental review rises to a legally sufficient level for permitting.

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49. *Id.* at 227–228 (citing FED. R. CIV. P. 15; Laber v. Harvey, 438 F.3d 404, 426 (4th Cir. 2006)) (reviewing the district court's legal conclusions *de novo*).

50. "Courts may only review 'final agency action,' U.S.C. § 704, and challenges to agency decisions that are yet to be made are not ripe for review." *Id.* (citing Pashby v. Delia, 709 F.3d 307, 317 (4th Cir. 2013)).

51. *Id.* at 228.

52. *Id.* at 228–229.

53. *Id.* at 228 (citing Save Our Sound OBX, Inc. v. North Carolina Dep't of Transp., No. 2:17-CV-4-FL, 2017 WL 7048561, at *5 (E.D.N.C. Dec. 5, 2017)).

54. *Id.* at 229.

55. As the opinion notes, the Agencies have not made a decision on the new information about the shipwreck, which could potentially give rise to new litigation.

56. *E.g.*, W. Riley Lochridge, Comment, *Allowing for Greater Admission of Evidence in NEPA Predetermination Suits*, 2011 U. CHI. LEGAL F. 375 (examining the Fourth Circuit, Tenth Circuit, and other approaches to predetermination analysis for NEPA suits).